56519 C

24pgs

14

No. 06-1082

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ~~LAWYERS IN SUPPORT OF RESPONDENT~~

Pamela Harris
Co-chair, Amicus Committee
National Association of
Criminal Defense Lawyers
1625 I Street, N.W.
Washington D.C. 20006
(202) 383-5386

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300

Warrington S. Parker, III
Alexander M.R. Lyon
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104

Counsel for Amicus Curiae

December 10, 2007

BEST AVAILABLE COPY

TABLE OF CONTENTS

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

A. Common Law And Historical Practice Have Influenced This Court's Interpretation Of The Fourth Amendment's "Reasonableness" Requirement. 3

B. Under Common Law, There Is No Right To Make A Warrantless Arrest For A Misdemeanor Unless The Law Affirmatively Deems The Offense An Arrestable Offense. 5

C. An Arrest For An Offense That Was Not Arrestable Was Always Unreasonable Even If There Was Probable Cause. 11

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Ashton v. Brown, 660 A.2d 447 (Md. 1995) 13, 15

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) ..... *passim*

Bad Elk v. U.S., 177 U.S. 529 (1900) 13

Brinegar v. United States, 338 U.S. 160 (1949) 12

Brock v. Fordyce, 108 Mass. 520 (1871) 9

Commonwealth v. Carey, 66 Mass. 246 (1853).... 8, 10

Commonwealth v. Phelps, 209 Mass. 369 (1911) 14

Commonwealth. v. Cheney, 141 Mass. 102 (1886) 17

Cook v. Hastings, 150 Mich. 289 (1907) 14

Cook v. Nethercote, 172 Eng. Rep. 1443 (K.B. 1835) 8

Coupey v. Henley, 2 Esp. 540 (K.B. 1797) 12

Coverstone v. Davies, 239 P.2d 876 (Cal. 1952) 18

D'Elia v. 58-35 Utopia Parkway Corp., 43 A.D.3d 976 (N.Y. 2007) 13

Daering v. State, 49 Ind. 56 (1874) 10, 14

Davenpeck v. Alford 543 U.S. 146 (2004) 11

Davis v. Russell, 130 Eng. Rep. 1098 (K.B. 1829) 14, 15

De Silva v. N.Y. Cent R. Co., 169 N.Y.S. 924 (N.Y. App. Div. 1918) 17

Delafoile v. New Jersey, 24 A. 557 (N.J. 1892) 10

Derecourt v. Corbishley, 119 Eng. Rep. 452 (K.B. 1855) 7, 11

Florida v. Wells, 495 U.S. 1 (1990) 11
Fox v. Gaunt, 3 B. & Ad. 798 (K.B. 1832) 12, 15
Gold v. Armer, 124 N.Y.S. 1069 (App. Div. 1910) 16
Goold v. Saunders, 194 N.W. 227 (Iowa 1923) 13, 14
Henry v. United States, 361 U.S. 98 (1959) 12
Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763) 12
In re Thierry, 566 P.2d 610 (Cal. 1977) 9
King v. Wilkes, 95 Eng. Rep. 737 (K.B. 1763) 6
Lyons v. Worley, 4 P.2d 3 (Okla. 1931) 9, 16
Maryland v. Pringle, 540 U.S. 366 (2003) 11
McCullough v. Greenfield, 95 N.W. 532 (Mich. 1903) 16
Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) 12
Michigan v. DeFillippo, 443 U.S. 31 (1979) 12
Money v. Leach, 97 Eng. Rep. 1075 (K.B. 1765) 6
Palmer v. Me. Central Ry. Co., 42 A. 800 (Me. 1899) 17
Parke v. Fellman, 145 A.D. 836 (N.Y. App. Div. 1911) 17
Payton v. New York, 445 U.S. 573 (1980) 3, 4
Phillips v. Fadden, 125 Mass. 198 (1878) 9, 11, 18
Rafferty v. People, 69 Ill. 111 (1873) 13
Regina v. Tooley, 92 Eng. Rep. 349 (K.B. 1710) 7, 13
Reuck v. McGregor, 32 N.J.L. 70 (N.J. Sup. Ct. 1866) 17
Rohan v. Sawin, 5 Cush. 281 (Mass. 1850) 14
Ross v. Leggett, 28 N.W. 695 (Mich. 1886) 15, 16
Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780) 14

South Dakota v. Opperman, 428 U.S. 364 (1976).... 12

State v. Hunter, 11 S.E. 366 (N.C. 1890)..... 16

Thamel v. Town of East Hartford, 373 F. Supp. 455 (D. Conn. 1974)..... 13, 15

The Baltimore and Ohio Railroad Co. v. Cain, 31 A. 801 (Md. 1895)..... 11

United States v. Robinson, 414 U.S. 218 (1973) 12

United States v. Watson, 423 U.S. 411 (1976) 3, 4, 5, 10, 11, 15

Whren v. United States, 517 U.S. 806 (1996) 11

Wilson v. Arkansas, 514 U.S. 927 (1995)..... 4, 5

STATUTES

Cal. Penal Code § 836 9

OTHER AUTHORITIES

10 Halsbury's Laws of England (3d ed. 1955) 10

4 W. Blackstone, Commentaries 292 10

Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 Utah L. Rev. 977 (2004)..... 14

Note, *Defiance of Unlawful Authority*, 83 Harv. L. Rev. 626 (1970) 13

Anthony J. Sebok, *Punitive Damages from Myth to Theory*, 92 Iowa L. Rev. 957 (2007)..... 12

Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortion and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 Wake Forest L. Rev. 239 (2002)..... 6

Horace L. Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541 (1924) 10

INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit national bar association that works in the interest of criminal defense attorneys and their clients. NACDL was founded to ensure justice and due process for persons accused of crimes and to foster the integrity, independence, and expertise of the criminal defense profession. NACDL has more than 12,500 members—joined by 90 affiliate organizations with 35,000 members—including criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. NACDL and its members have a strong interest in ensuring that unauthorized and unreasonable arrests not be used to justify warrantless searches of criminal defendants.[1]

---

[1] This *amicus* brief is filed with the consent of the parties, who filed letters of consent with the Clerk of Court in accordance with Supreme Court Rule 37.3(a) on October 16, 2007, and November 5, 2007. Pursuant to Supreme Court Rule 37.6, the *amicus* submitting this brief and its counsel represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

SUMMARY OF ARGUMENT

Viewed through the lens of the common law, which this Court has consulted in the past when considering the protections afforded by the Fourth Amendment, the arrest at issue in this case was wholly unreasonable. It cannot be justified. The fruits of any search incident to the arrest must be suppressed.

At common law, as articulated by English and American courts, a warrantless misdemeanor arrest is justified, and justifiable, only to the extent there is an affirmative grant of authority to make an arrest for the specific category of offense in question. As this Court has recognized, the precise scope of arrestable offenses under common law, as sometimes modified by statute, has varied over time as legislatures have changed or expanded the authority to arrest for misdemeanors. But throughout, an offense could not be the basis of a lawful arrest unless it fell within the universe of offenses for which there was express authority to arrest.

An arrest for an offense falling outside the scope of arrestable offenses—outside the express grant of authority—could never be justified and was always considered unreasonable. Precisely because such an arrest is unreasonable, common law dictated (and still dictates) that the officer who made such an arrest is liable for damages, including punitive damages.

Contrary to the State's argument, a warrantless misdemeanor arrest could not be justified under common law simply because there was probable cause to believe that a misdemeanor had occurred,

or even because the officer witnessed it. If the arrest is not authorized by a positive grant of authority to arrest for that offense, it is unreasonable—and neither probable cause to believe that the misdemeanor was committed, nor a good faith belief that it was committed, nor even witnessing its commission can make the arrest reasonable.

Applying these principles to this case, the arrest of Mr. Moore is unreasonable under common law because the State, itself, has declared it unreasonable by placing Mr. Moore's offense outside the universe of arrestable offenses. It should be considered unreasonable for purposes of the Fourth Amendment. And, because the arrest is unreasonable, so is any search that is incident to that arrest.

ARGUMENT

A. Common Law And Historical Practice Have Influenced This Court's Interpretation Of The Fourth Amendment's "Reasonableness" Requirement.

This Court has frequently looked to the common law and historical practice in defining the "reasonableness" requirement of the Fourth Amendment. Of special relevance here, the Court has placed significant emphasis on such evidence when evaluating the "reasonableness" of an arrest. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001); *Payton v. New York*, 445 U.S. 573, 591 (1980); *United States v. Watson*, 423 U.S. 411, 418-22 (1976).

The evidence considered by the Court includes (1) English decisions, statutes, and legal commentators pre-dating the Framing, (2) early American law as expressed in State constitutions, Colonial and State statutes, and reported decisions, (3) early Congressional actions, and (4) historical practice within the United States since the Framing. *See Watson*, 423 U.S. at 418-22; *Wilson v. Arkansas*, 514 U.S. 927, 931-34 (1995); *Atwater*, 532 U.S. at 327-39.

In *Wilson*, for example, the Court relied on 17th and 18th century English law, 19th century State constitutional provisions and legislation, and 19th century American decisions relating to a law enforcement officer's need to announce his presence and authority prior to entering a home. 514 U.S. at 931-36.

And in *Watson*, in deciding whether it was illegal for a postal inspector to arrest a suspect for mail theft pursuant to a federal statute allowing warrantless arrests, 423 U.S. at 414, the Court considered the historical treatment of warrantless felony arrests in the English common law, 19th century American decisions, the Second Congress, and the then-recent ALI Model Code of Prearraignment Procedure, *see id.* at 418-22.

Sometimes, of course, the Court's analysis yields no consistent historical account that can inform Fourth Amendment interpretation. *See, e.g., Payton*, 445 U.S. at 598 (declining to resolve constitutionality of state statute allowing warrantless arrests by reference to common law alone where "the issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted").

But where the historical record reflects a consistent common law tradition accepted by English and American courts, the Court has often relied on that tradition in deciding what is "reasonable" under the Fourth Amendment. *Watson*, 423 U.S. at 418-22; *Wilson*, 514 U.S. at 931-36.

As discussed below, there is a common law tradition with respect to the power to effect a warrantless misdemeanor arrest—it undermines the State's ahistorical arguments.

B. Under Common Law, There Is No Right To Make A Warrantless Arrest For A Misdemeanor Unless The Law Affirmatively Deems The Offense An Arrestable Offense.

At common law, a warrantless misdemeanor arrest was not justified—and not considered reasonable—unless the law affirmatively deemed the offense to be an arrestable offense. An arrest for the offense had to be authorized by some source of positive law. That authority could be granted by historical tradition, which allowed an arrest not for any misdemeanor, but only for the class of misdemeanors that qualified as breaches of the peace. Alternatively, that authority could be granted by legislative enactment, as this Court underscored in *Atwater*. 532 U.S. at 328, 337. Whatever the source, the affirmative grant of authority for a misdemeanor arrest had to be explicit.[2]

---

[2] In *Atwater*, this Court noted that there were a variety of offenses that were considered a breach of the peace such that

(footnote continued...)

That was the rule in England. In determining whether an arrest was appropriate, courts were careful to identify the specific authority that justified the arrest. In *Regina v. Tooley*, 92 Eng. Rep. 349 (K.B. 1710), for example, the court undertook to determine whether defendants were answerable for a murder they committed when they sought to free a person who was claimed to be unlawfully arrested. Key to the court's decision was whether the arrest was authorized. Were it an unauthorized arrest, a murder claim could not be made, although there was still some debate

---

(continued from previous page)
the narrow definition offered by a party in that case was not viable. 532 U.S. at 329-39. *Amicus* does not seek to revive any contrary argument. Nonetheless, at common law, the right to arrest for an offense was not unlimited. For example, *Money v. Leach*, 97 Eng. Rep. 1075, 1088 (K.B. 1765), which *Atwater* cited for the proposition that the common law "in many cases, gives the authority to arrest," 532 U.S. at 332 n. 6, concluded that the general warrant at issue was "illegal and bad." 97 Eng. Rep. at 1088. In so holding, the court noted that no common law justification for the arrest had been offered. *Id. King v. Wilkes*, 95 Eng. Rep. 737 (K.B. 1763), also addressed whether a general warrant authorized an arrest. It is true, as noted in *Atwater*, that the *Wilkes* court mentioned that an arrest could be effected for a crime committed in the presence of a peace officer. However, that was dicta, at issue was not a warrantless arrest. It does not appear that the court, in a single sentence, sought to expand, overrule or suggest as wrong the common law tradition that cabined the authority to make warrantless arrests. *See also,* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortion and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 Wake Forest L. Rev. 239, 314-317 (2002) (discussing the breadth of common law authority to arrest for misdemeanors).

whether a manslaughter claim was viable. In reaching its decision, the court noted that the arresting officer had a warrant; however, the court was careful to note that the warrant did not authorize the arrest at issue. In the court's own words: "But taking him to be a lawful officer, yet that will not justify his acting any thing beyond his authority: it does not appear, that he ever acted under the recruit warrant; and though, if he see persons fighting, he may restrain them ex officio, or take up suspicious persons, yet the taking of this woman was not lawful . . . ." *Id.* at 351. In terms of the suspicion necessary to justify the arrest, the court noted that the right to arrest was not unfettered. "[I]t is not a constable's suspecting, that will justify his taking up a person, but it must be just grounds of suspicion . . . as if a felony had been done . . . ." *Id.* at 352. Continuing, the court noted that with regard to warrantless arrests, the authority to arrest was limited: "[A] constable cannot arrest, but when he sees an actual *breach of the peace;* and if the affray be over, he cannot arrest." *Id.* (emphasis added).

As any reader at the time would have understood, not every misdemeanor rises to the level of a "breach of the peace." So, the court's analysis confirmed that even if an officer personally witnessed a misdemeanor, he did not necessarily have the authority to make a warrantless misdemeanor arrest; in order to be legally permitted to make an arrest for a misdemeanor, it had to be a particular class of misdemeanor.

In *Derecourt v. Corbishley*, 119 Eng. Rep. 452 (K.B. 1855), the court faced a similar question—

whether the constable had the right to make the arrest. The issue was alternatively phrased as "[w]as what the constable did justifiable?" *Id.* at 453. In answering this question, the court noted that there were limitations to the right arrest. "I admit that for a mere misdemeanor which has passed by[,] the constable has no power to take up of his own authority." *Id.* The arrest at issue was, however, justified because the offense was a breach of the peace witnessed by the arresting official. *Id.* at 451, 453; *see also Cook v. Nethercote*, 172 Eng. Rep. 1443, 1445 (K.B. 1835) ("[T]he power is given [the constable] by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed . . . by obtaining a warrant.").

Courts in the United States adopted this tradition from England. Here, too, a warrantless misdemeanor arrest must be justified by some positive grant of authority, *i.e.*, it must be an offense for which authority has been granted to make an arrest. In granting the authority to arrest, states have adopted a variety of approaches. Some have defined offenses as felonies, thus broadening the right to arrest. *See Commonwealth v. Carey*, 66 Mass. 246 (1853). In *Carey*, the court noted that by statute the legislature had "in a great measure obliterated" the line between misdemeanors and other offenses. *Id.* at 252. Yet, despite noting the similarity between the misdemeanor at issue and those crimes defined as felonies, the court found an arrest to be illegal and improper because the conduct at issue remained a misdemeanor for which there was no granted authority to make the arrest. *Id.* at 253.

In some places, the common law rule has been supplanted by statute. For example, as the California Supreme Court has explained, "[a]t common law it was the general rule that a warrant was required for a misdemeanor arrest unless the offense amounted to a breach of the peace and was committed in the presence of the arresting officer." *In re Thierry S.*, 566 P.2d 610, 613 (Cal. 1977). But the legislature expanded the common law rule, giving an officer much broader authority to make a warrantless arrest for *any* misdemeanor committed in his presence. *Id.*; Cal. Penal Code § 836; *see also Atwater*, 532 U.S. at 327-45, 355-60 (discussing and citing state laws that expand the right to arrest for misdemeanors).

While respecting the legislative power to broaden the universe of arrestable offenses beyond those offenses recognized at common law, courts have still reaffirmed the basic proposition that it is impermissible for an officer to make a warrantless arrest for a misdemeanor without a grant of power. For example, the court in *Lyons v. Worley*, 4 P.2d 3, 5 (Okla. 1931), noted that Oklahoma's statutes granted more authority to officers to arrest for misdemeanors than that afforded at common law. Nonetheless, the court found that this expansion did not create the right to arrest beyond the specific grant of authority. "[W]hile the codifiers of our law saw fit to extend the authority to arrest without a warrant to all public offenses," the court found that further extension could not be allowed "except by bald judicial legislation," which the court refused. *Id.* at 6; *see also Phillips v. Fadden*, 125 Mass. 198, 201-02 (1878) (finding officer liable where he exceeded the expanded arrest authority of a public drunkenness statute); *Brock v. Stimson*,

108 Mass. 520, 522 (1871) (same); *Delafoile v. State*, 24 A. 557, 558 (N.J. 1892) (noting that an officer's common law powers allowed him to make a warrantless arrest for "*some* misdemeanors" (emphasis added)); *accord* 4 W. Blackstone, Commentaries On The Laws Of England 292 (noting that right to arrest without warrant extended to felonies and breaches of the peace).

To be sure, some cases suggest that the common law authority to arrest was broader. They render the "old established rule of the common law" as holding that an officer may arrest for *any* misdemeanor committed in his presence. *Carey*, 66 Mass. at 251-52; *see also, e.g., Watson*, 423 U.S. at 418; *Daering v. State*, 49 Ind. 56, 58-59 (1874). However, to use this Court's expression, this shorthand statement of the common law "tends to mislead." *Atwater*, 532 U.S. at 329.

For example, in considering the propriety of a warrantless felony arrest, in dicta the *Watson* Court broadly characterized common law as authorizing warrantless arrests for any misdemeanor committed in the presence of a peace officer. *See* 423 U.S. at 418. However, the authority the Court cited for this proposition establishes that the right to arrest for a misdemeanor was more circumscribed. Halsbury's Laws of England, cited by the Court, notes that the arrest authority was limited to arrests for a breach of the peace. 10 Halsbury's Laws of England 344-345 (3d ed. 1955). The law review article the Court cited was also careful to note that the common law rule was that the arrest authority depended on a breach of the peace committed in an officer's presence. *See* Horace L. Wilgus, *Arrest Without a*

Warrant, 22 Mich. L. Rev. 541, 547-50 (1924).[3]

C. An Arrest For An Offense That Was Not Arrestable Was Always Unreasonable Even If There Was Probable Cause.

The State posits that probable cause justifies any arrest whether it be for a felony or for a misdemeanor. Pet. Br. at 9, 14-17. However, such an argument finds no support in the historical record. The cases cited by the State also do not support the assertion. The question of whether there was authority granted to arrest for the offense in question was not raised or addressed.[4]

---

[3] Other similar assertions can also be discounted for similar reasons. For example, the court in *Baltimore and Ohio Railroad Co. v. Cain*, 31 A. 801, 803 (Md. 1895), stated that "[i]t is settled that an officer has the right to arrest without a warrant for any crime committed within his view. It was his duty to do so at the common law and this is still the law." As in *Watson*, the authorities cited for this proposition confirm that it is an overly broad and inaccurate characterization of common law. *Derecourt v. Corbishley*, 119 Eng. Rep. 452 (1855), as noted, did not hold that the commission of any misdemeanor in the presence of a peace officer justified an arrest. The offense at issue was a breach of the peace for which, as noted, a warrantless arrest was authorized provided it was committed in the presence of a constable. The same is true of *Phillips v. Trull*, 11 Johns. 486 (N.Y. 1814), also cited by the *Cain* court.

[4] *See Davenpeck v. Alford*, 543 U.S. 146 (2004) (no argument made that statutes invoked did not authorize arrest); *Maryland v. Pringle*, 540 U.S. 366 (2003) (same); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (statute authorized arrest); *Whren v. United States*, 517 U.S. 806 (1996) (authority to effect traffic stop not challenged); *Florida v. Wells*, 495 U.S. 1 (1990) (authority to stop for

(footnote continued...)

In fact, at common law, an arrest for an unarrestable offense could not be justified, even where there was probable cause to believe, or irrefutable evidence to show, that an offense had occurred.

At common law, a warrantless arrest for an offense for which there was no authority to arrest was illegal and could not be considered reasonable. Indeed, precisely because such an arrest was unreasonable, English common law provided that an arrestee was fully within his rights to resist arrest if an officer tried to arrest him for a crime that was not subject to arrest. *See, e.g., Regina v. Tooley*, 92 Eng. Rep. 349, 350 (K.B. 1710). Moreover, the arresting officer was liable for damages to the arrested person for the unreasonable arrest. *See, e.g., Fox v. Gaunt*, 3 B.& Ad. 798 (K.B. 1832); *Coupey v. Henley*, 2 Esp. 540 (K.B. 1797). Such arrests were considered so unreasonable that the victim was entitled to punitive damages to deter the conduct and ensure full compensation. *See Huckle v. Money*, 95 Eng. Rep. 768 (K. B. 1763); Anthony J. Sebok, *Punitive*

(continued from previous page)
speeding not challenged); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (authority to enforce laws prohibiting drunk driving law unchallenged); *Michigan v. DeFillippo*, 443 U.S. 31, 39-40 (1979) (statute authorized arrest); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (search followed lawful impoundment of car); *United States v. Robinson*, 414 U.S. 218 (1973) (authority to arrest not challenged); *Henry v. United States*, 361 U.S. 98 (1959) (statute gave authority to arrest); *Brinegar v. United States*, 338 U.S. 160 (1949) (statutory power to arrest not challenged).

Damages from Myth to Theory, 92 Iowa L. Rev. 957, 977 (2007).

These rules found acceptance in the United States. Here, as in England, arrestees are entitled (unless there are statutes abrogating the right) to resist arrest if the offense is outside the scope of arrestable offenses. *See Bad Elk v. U.S.*, 177 U.S. 529, 534-35 (1900); *Rafferty v. People*, 69 Ill. 111, 118 (1873); Note, *Defiance of Unlawful Authority*, 83 Harv. L. Rev. 626, 636 (1970). Here, too, an officer is liable for damages for an arrest for an offense that should not have been subject to arrest. *See, e.g., Goold v. Saunders*, 194 N.W. 227, 229 (Iowa 1923); *Thamel v. East Hartford*, 373 F. Supp. 455, 458 (D. Conn. 1974); *Ashton v. Brown*, 660 A.2d 447, 472 (Md. 1995). And, a plaintiff suing for unlawful arrest may still obtain punitive damages. *See, e.g., D'Elia v. 58-35 Utopia Parkway Corp.*, 43 A.D.3d 976, 341-42 (N.Y. 2007).

And contrary to the State's argument, if an officer arrested a person for a misdemeanor that was not arrestable, the unreasonable arrest could not be justified on the ground that the officer had probable cause to believe that the offense had been committed. To be sure, as a general rule, in both England and here, an officer could always arrest so long as he had probable cause to believe the arrestee had committed a *felony*.[5] *See, e.g.,*

---

[5] Some cases—particularly those decided around the time of the Framing—use the term "reasonable suspicion" and not "probable cause." There is a scholarly debate over what precisely the term "reasonable suspicion" meant; however,

(footnote continued...)

Samuel v. Payne, 99 Eng. Rep. 230 (K.B. 1780) (considering the officer's "reasonable charge of a felony" as dispositive of the propriety of the arrest even if it were later found that no felony had actually been committed); *Davis v. Russell*, 130 Eng. Rep. 1098, 1102-03 (K.B. 1829) (same); *Daering*, 49 Ind. at 58-59 (noting that an officer could arrest for a felony based on probable cause); *Goold*, 194 N.W. at 229 (holding that defendant officer would be liable for injuries sustained when he accidentally shot the wrong perpetrator of mail robbery unless the officer could show "reasonable grounds for believing that the plaintiff was guilty").[6] That was because felonies were arrestable offenses.

But because not every misdemeanor was an arrestable offense, there was no such rule for *misdemeanors*. If the misdemeanor was not arrestable, the officer could not legally arrest. It did not matter that the officer had probable cause

---

(continued from previous page)
commentators are agreed that it meant that some evidence of wrong-doing was necessary. Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 Utah L. Rev. 977, 978-80 & n. 10 (2004).

[6] *See also Commonwealth v. Phelps*, 209 Mass. 369, 407-08 (1911) (felony arrest justified by probable cause); *Cook v. Hastings*, 150 Mich. 289, 290 (1907) (finding it significant in evaluating the propriety of arrest that there were no reasonable grounds to believe the arrestee had committed a felony); *Rohan v. Sawin*, 5 Cush. 281, 285 (Mass. 1850) (stating that an officer would be free from liability for a warrantless arrest if he had "probable and reasonable grounds for believing the party guilty of a felony").

to believe the arrestee committed the crime, or (as we have seen) even that the officer personally witnessed it. That is why the courts, both here and in England, have been careful to draw this sharp distinction between felonies and misdemeanors.

In *Fox v. Gaunt*, 3 B. & Ad. 798 (K.B. 1832), for example, the court rejected the argument that a warrantless misdemeanor arrest was permissible where there was probable cause to believe that the offense had occurred outside of the presence of the officer. In so holding the court stated that "[t]he instances . . . of an arrest on suspicion after the fact is over, relate to felony;" it noted that this distinction between a felony and a misdemeanor is a rule that "must be made absolute." *Id.* at 800; *see also Davis*, 130 Eng. Rep. at 1102. Our courts have followed the same distinction. *See Watson*, 423 U.S. at 421-23 (stating that "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact," and that Section 120.1 of the Model Penal Code mirroring this part of the common law is "the rule Congress has long directed its principal law enforcement officers to follow"); *Ross v. Leggett*, 28 N.W. 695, 697 (Mich. 1886) (noting that, unlike misdemeanor arrests, felony arrests can be effected upon "proper information,—such information as would justify a reasonable man in acting upon it").

In keeping with these principles, our courts have followed the common law rule that "denied a police officer a 'good faith' or 'probable cause' defense in a suit for false arrest for a misdemeanor." *Thamel*, 373 F. Supp. at 458; *see also Ashton*, 660 A.2d at 472 ("The Court has

consistently held that probable cause is not a defense in an action for false imprisonment based upon a police officer's warrantless arrest for the commission of a non-felony offense."); *Gold v. Armer*, 124 N.Y.S. 1069, 1069 (App. Div. 1910) ("It follows that the question of reasonable cause was not an element bearing upon the plaintiff's right to recover.").

Not even actual guilt is a justification. In *Lyons*, for example, the arresting officer was found liable for common law trespass although plaintiff in the common law action had admitted to having committed a misdemeanor. The court allowed the common law claim to go forward because the misdemeanor statute, which expanded the common law rights to arrest, only authorized an arrest for a misdemeanor committed in the presence of the officer. 4 P.2d at 6. *Lyons* does not stand alone. In *Ross*, the court instructed the jury that a misdemeanor arrest could be considered illegal if not authorized even though the jury might find the arrestee committed the misdemeanor. 28 N.W. at 696-97. In *McCullough v. Greenfield*, 95 N.W. 532, 534 (Mich. 1903), the fact that the arrestee later pleaded guilty to the offense did not absolve the officer of liability for the initial illegal misdemeanor arrest. *See also State v. Hunter*, 11 S.E. 366, 369 (N.C. 1890) (despite arrestee's admission that he had been drinking, officer lacked authority to make misdemeanor arrest).

This is not to say that probable cause is completely irrelevant. Even though it will not make an otherwise unreasonable arrest reasonable, probable cause that a crime was committed is relevant to three issues.

First, although it is not a complete defense, probable cause to believe that a crime had been committed could be asserted to mitigate damages. "The law is well settled that, in an action for false imprisonment, plaintiff having made out a case of false arrest, it is 'for defendants to show, if they could, that they had probable cause, and this not to wholly defeat the action, but to mitigate the damages.'" *De Silva v. N.Y. Cent R. Co.*, 169 N.Y.S. 924, 925 (App. Div. 1918) (quoting *Parke v. Fellman*, 145 A.D. 836, 837 (N.Y. App. Div. 1911)); *see also Reuck v. McGregor*, 32 N.J.L. 70, 75-76 (N.J. Sup. Ct. 1866) (holding that probable cause should reduce damages in a case of wrongful citizen's arrest); *Palmer v. Me. Central Ry. Co.*, 42 A. 800, 804 (Me. 1899) ("Where the justification for an arrest fails, . . . the plaintiff is entitled to recover, at least, compensatory damages, . . . although the defendant may have acted in good faith, without malice, and upon reasonable grounds.").

Second, probable cause was relevant where an officer was being *criminally* prosecuted for making an improper misdemeanor arrest. "If [the officer] acted in good faith, upon reasonable and probable cause of belief, without rashness or negligence," he cannot be held criminally liable "because he is found to be mistaken." *Commonwealth v. Cheney*, 141 Mass. 102, 104 (1886). Still, good faith was no defense to the asserted wrongfulness of the arrest. *Id.* at 103.

Finally, probable cause is relevant to the issue of whether the arrest is appropriate if the offense at issue is an offense for which there is authority to arrest. If there is a statute that allows the officer to

arrest for the specific misdemeanor at issue, courts will seek to determine whether the arresting officer had probable cause to believe that the offense was being committed. *See, e.g., Coverstone v. Davies*, 239 P.2d 876, 879 (Cal. 1952) (collecting cases).[7]

This treatment of "probable cause" in the context of the warrantless misdemeanor arrest stands in contrast to the State's proposal that Mr. Moore's arrest was reasonable under the Fourth Amendment just because the officers had probable cause to believe he was driving on a suspended license. Under common law principles, this analysis fails because it does not matter whether there was probable cause to believe that Mr. Moore was driving on a suspended license or irrefutable proof that he was. The arrest was not authorized. It was, therefore, unreasonable.

*****

[7] Some cases that hold that an officer making an arrest for a misdemeanor has the duty to prove that the person arrested is actually guilty of the crime. *See, e.g., Phillips v. Fadden*, 125 Mass. 198, 201 (1878).

CONCLUSION

The argument that the warrantless arrest of Mr. Moore is "reasonable" because the officers had probable cause to believe he committed a misdemeanor finds no support in either English or American legal traditions. To the contrary, the arrest of Mr. Moore for an unarrestable offense was unreasonable at common law and should be considered unreasonable under the Fourth Amendment.

Respectfully submitted,

Pamela Harris
Co-chair, Amicus Committee
National Association of Criminal Defense Lawyers
1625 I Street, N.W.
Washington D.C. 20006
(202) 383-5386

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300

Warrington S. Parker, III
Alexander M.R. Lyon
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104

Counsel for Amicus Curiae

December 10, 2007